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QUESTION PRESENTED

Whether 47 U.S.C. § 533(b), which prohibits local telephone companies from providing video programming directly to subscribers in their telephone service areas, violates the First Amendment.

RULE 29.1 STATEMENT

Amicus curiae GTE Corporation is a publicly-held corporation in the business of providing telecommunications services and products to the general public. GTE Corporation is the parent company of GTE Service Corporation and the GTE telephone operating companies. The following subsidiaries of GTE Corporation have securities in public hands:

B.C. Telecom, Inc.
Caribbean Reservation Center, C. por. A.
Communications Telefonicas, C. por. A.
Florence Cellular Telephone Company, Inc.
GTE California Incorporated
GTE Directories Corporation Lanka (PVT.) Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
La Compagnie de Telephone Anglo-Canadienne/
  Anglo-Canadian Telephone Company
MTX Italia
Parque Industrial ITABO, S.A.
Quebec-Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Zona France Las Americas

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Nos. 94-1893; 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL.,
and
NATIONAL CABLE TELEVISION ASS'N, INC.,
Petitioners,

v.

BELL ATLANTIC CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR GTE CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Amicus curiae GTE Corporation and its affiliated companies ("GTE") are in the business of providing telecommunications services and products, including local telephone services, to the general public. *Amicus*, like Bell Atlantic, has challenged the constitutionality of 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" to subscribers in their service areas. In *GTE South v. United States*, Civ. Action No. 94-1588-A (E.D. Va. Jan. 15, 1995), the District Court declared that Section 533(b), on its face, violates GTE's right of free speech

guaranteed by the First Amendment of the United States Constitution. The Government has filed a notice of appeal in *GTE South*, but the parties have agreed to stay that appeal pending resolution of this case by this Court. *Amicus* GTE Corporation therefore has a substantial interest in this Court's determination of the constitutionality of Section 533(b).[1]

SUMMARY OF ARGUMENT

Amicus GTE agrees with respondent Bell Atlantic that Section 533(b), as a direct ban on speech, should be subject to strict scrutiny, and that, under *either* strict scrutiny or intermediate scrutiny, Section 533(b) is unconstitutional.

In this brief, *amicus* GTE discusses the impact of the FCC's *Third Report and Order* on this litigation. (May 1995 Supplemental Brief of Petitioners In Support of Petition For A Writ of Certiorari 1a-21a ("Gov't Supp. Br."). In the *Third Report and Order*, the FCC concluded that Section 533(b)(4) authorizes it to grant waivers to Section 533(b)'s unequivocal prohibition on telephone companies providing video programming in their service areas. The FCC explicitly declined, however, to specify in the *Third Report and Order* any of the terms and conditions that it would require for a waiver of Section 533(b), promising only to announce those terms and conditions sometime in the future.

In their briefs, the Government and the National Cable Television Association ("NCTA") attempt to characterize the *Third Report and Order* as a "saving construction" of Section 533(b), one which purportedly avoids the constitutional infirmities with that section found by every district and circuit judge to consider the merits of the issue. However, as we

[1] GTE has obtained the written consent of petitioners, the United States and the National Cable Television Association ("NCTA"), as well as of respondent Bell Atlantic Corporation, to file this *amicus* brief. The letters of consent are on file with the Clerk of this Court.

demonstrate herein:

1. The *Third Report and Order* is not a "saving construction" of Section 533(b), if for no other reason than it is not a "construction" of the scope of that prohibition's ban of speech. The *Third Report and Order* purports to construe the FCC's *waiver authority under Section 533(b)(4)*, but in doing so, it does not purport to delineate in any specific way the reach of *Section 533(b)(1)-(2)'s ban on speech*. It is difficult to fathom how the Government and the NCTA can ask this Court to hold that the *Third Report and Order* alleviates the constitutional infirmities in Section 533(b) when the *Third Report and Order* does not even purport to specify what speech will be allowed under the waiver regime that it contemplates and what speech will remain prohibited by Section 533(b).

2. In any event, the waiver regime contemplated by the *Third Report and Order* is no less unconstitutional than Section 533(b) itself. The *Third Report and Order* replaces an unconstitutional flat ban on speech with an equally unconstitutional flat ban on speech subject to waivers to be granted by bureaucrats according to standards, and subject to conditions, of their own making, which are as yet unknown and which in any event are not meaningfully constrained by any language in the statute. Such a standardless licensing scheme plainly violates the First Amendment.

3. The real significance of the *Third Report and Order* lies not in its uselessness as a "saving construction," but rather in the crucial concessions made in it by the FCC. As we demonstrate in Part III below, in the course of justifying its authority to grant waivers to Section 533(b), the FCC undermines the arguments advanced by the Government in defense of Section 533(b). In short, far from saving Section 533(b), the *Third Report and Order* buries it even deeper.

ARGUMENT

I. THE *THIRD REPORT AND ORDER* CANNOT BE A "SAVING CONSTRUCTION" OF SECTION 533(b) BECAUSE IT IS NOT EVEN A "CONSTRUCTION" OF THE SCOPE OF SECTION 533(b)'S BAN ON SPEECH.

The most basic reason why the *Third Report and Order* is not a "saving construction" of Section 533(b) is that it is not a "construction" of that prohibition's ban on speech. In the *Third Report and Order*, the FCC construes generally its *waiver authority under Section 533(b)(4)*, but in doing so it does not in any specific way delineate the reach of *Section 533(b)(1)-(2)'s ban on speech*. There is simply no basis for this Court to conclude that the *Third Report and Order* sufficiently narrows the scope of the statutory ban on speech to save it from unconstitutionality, because the FCC *explicitly* disavows determining the terms and conditions under which telephone companies will be allowed to speak.

In its brief, the NCTA mischaracterizes the *Third Report and Order* as having "explicitly concluded that [the] direct provision of video programming [by telephone companies] *is* authorized under [a] single set of conditions." (NCTA Br. 28 (emphasis in original).) This statement could not be further from the truth. The *Third Report and Order* most assuredly does not determine *any* "single set of conditions" under which telephone companies will be allowed to speak. Although the FCC concludes in the *Third Report and Order* that it has "the *legal authority* to grant waivers allowing telephone companies to provide video programming in their telephone service areas on video dialtone networks," (Govt. Supp. Br. 2a (emphasis added)), it explicitly "do[es] not decide whether telephone companies may provide video programming over video dialtone networks rather than as traditional cable operators," (*id.*). Nor, the FCC states explicitly, does it decide in the *Third Report and Order* under what "terms and conditions" a telephone company will be allowed to provide video programming. (Govt. Supp. Br. 6a, n.11.) Nor does the FCC even decide generally whether, "*if* a telephone company is permitted to provide video programming on a video dialtone system, . . . that telephone company should be regulated [as a common carrier] under Title II or [as a cable operator under] Title VI of the Communications Act." (Govt. Supp. Br. 2a-3a (emphasis added).)[2]

In short, the *Third Report and Order* settles *nothing* about the scope of Section 533(b)'s ban on speech. Instead, it merely decides that the FCC has the *authority* under Section 533(b)(4) to issue good cause waivers to allow telephone companies to provide video programming over a video dialtone network *if* the FCC ultimately decides that it wants to do so, and subject to conditions not yet determined. Because the *Third Report and Order* does not even purport to determine the scope of Section 533(b)'s ban on telephone company speech, it cannot be a narrowing construction that saves Section 533(b) from the conclusion that the statute is facially unconstitutional under the First Amendment. *See Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (statute that imposes direct restriction on speech that is too imprecise to satisfy First Amendment is "properly subject to facial attack," and "[t]he possibility of a waiver may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect").

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[2] The only hint in the *Third Report and Order* as to the conditions under which the FCC will grant a waiver to Section 533(b) is the FCC's statement that "video dialtone necessarily includes a common carriage element," thus indicating that the FCC will likely try to use Section 533(b) to impose a common carrier requirement on telephone companies, which it cannot impose on cable companies. But again, in this very same paragraph, the FCC explicitly reiterates that it "ha[s] not yet adopted definitive rules governing the conditions under which telephone companies may be permitted to act as video programmers." (Govt. Supp. Br. 13a.)

II. THE WAIVER REGIME EMBODIED IN THE *THIRD REPORT AND ORDER* IS AN UNCONSTITUTIONAL STANDARDLESS LICENSING SCHEME.

In any event, the FCC's interpretation in the *Third Report and Order* of its waiver authority does not alleviate the constitutional infirmities in Section 533(b). Indeed, if anything, it *compounds* them by vesting in the FCC an unconstrained, standardless licensing power over the free speech rights of telephone companies. *See Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395, 2401-03 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 769-72 (1988); *Joseph H. Munson Co.*, 467 U.S. at 964 n.12. The *Third Report and Order*, in other words, impermissibly "trade[s] a direct prohibition on [telephone company speech] for a licensing scheme that, if it is available to [telephone companies] at all, is available only at the unguided discretion of the [FCC]." *Joseph H. Munson Co.*, 467 U.S. at 964 n.12.

Section 533(b) makes it flatly unlawful for telephone companies to provide video programming, either directly or indirectly, to subscribers in its telephone service area. In the *Third Report and Order*, the FCC promises that it will "routinely" grant waivers to that seemingly unequivocal prohibition for "good cause," (Govt. Supp. Br. 4a), but only "where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming," *id.* at 19a. As noted above, in the *Third Report and Order*, the FCC does not purport to determine the terms and conditions to which it will require a telephone company to agree before it will grant the telephone company a good cause waiver to provide video programming. Nor does Section 533(b) set up any special procedure either for setting the terms and conditions for "good cause" or for considering requests from a telephone company for such a waiver.

In the past, this Court has looked with suspicion at statutes and ordinances that grant executive officials the power to grant or deny a license to speak. As the Court noted in *Joseph H. Munson Co.*, "[b]y placing discretion in the hands of an official to grant or deny a license [to speak], such a statute creates a threat of censorship that by its very existence chills free speech." 467 U.S. at 964 n.12. *See City of Lakewood*, 486 at 757 ("mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech"). Section 533(b), as construed by the *Third Report and Order*, has all of the attributes that this Court has found unacceptable in unconstitutional speech-licensing schemes.

In particular:

First, a legislature "cannot vest restraining control over the right to speak [in] an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951). Here, there are no meaningful standards in Section 533(b) to restrain the exercise of the FCC's discretion to grant or deny a waiver. Nothing in the statute purports to constrain the terms and conditions that the FCC can require before it will grant a waiver to Section 533(b)'s flat ban on speech, and nothing in the statute ensures that the FCC will apply those terms and conditions consistently, uniformly, or fairly once it has set them.

The fact that the statute authorizes waivers for "good cause" does not constitutionally constrain the discretion of the FCC. There is no statutory definition of "good cause," and nothing in the statute otherwise constrains the terms and conditions that the FCC may set for waivers. It is inconceivable that this Court would uphold against First Amendment challenge a city ordinance that made all picketing illegal, on the ground that the ordinance allowed the police commissioner to grant a waiver for "good cause." And we must believe that it would make no difference to this Court if the police commissioner promised, as the FCC has done, to

issue waivers "routinely" according to "speech friendly" standards that he would not even begin to develop until after the Court had decided the constitutional challenge raised in the case.

Second, a speech-licensing scheme violates the First Amendment unless it contains numerous procedural safeguards, all of which are lacking here. In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court struck down a state law that prohibited the exhibition of any motion picture without first submitting it to a state administrative board for review. Even though the state law had established a detailed set of procedures to govern decisions made by the administrative board, this Court held that the scheme violated the First Amendment because certain other protections were lacking. These additional safeguards, which the Court held to be essential, included: (i) that the government officials must have the burden of proving that any decision they make to suppress speech is constitutional; (ii) that any such decision must be made within a specified brief period; and (iii) that expedited judicial proceedings to review the decision must be assured. *Freedman*, 380 U.S. at 58-60.

None of these procedural safeguards, and nothing like them, is present in Section 533(b) or in the *Third Report and Order*. The FCC has not even established the substantive terms and conditions to govern its waiver power, much less whether it will implement such rigorous procedures in considering requests for a waiver. There is no onus on the FCC to prove why a telephone company should not be allowed to speak; rather, Section 533(b) provides that, unless the telephone company receives a waiver, it cannot speak. There is no requirement that the FCC must decide waiver applications within any specified brief time, and it is stipulated in this case that waiver applications have languished at the FCC *for years*. (*See* J.A. 204-05.) And there is neither any provision for expedited judicial review of the denial of a waiver by the FCC nor any meaningful standards in the statute by which a court

could judge the FCC's exercise of its broad discretion. In short, *none* of the important procedural safeguards necessary for a constitutional system of speech licensing is present here.

Third, the Court has previously held that, if a legislative body could have served the relevant government interests in an alternative manner that is obviously less burdensome to speech, a statute is not saved by the fact that an executive official can give dispensation to speak. The Court made this important point explicitly in *Joseph H. Munson Co.*, where it held that the possibility of a waiver from a statutory prohibition of speech does not save a statute when the government's interests could have been protected by a restriction that was less burdensome on speech: "[W]here there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity." 467 U.S. at 964 n.12.

The importance of this point cannot be overemphasized. If this Court were to accept petitioners' argument that the *Third Report and Order* avoids the constitutional difficulties with Section 533(b), then the "less restrictive alternative" requirement embodied in both strict and intermediate scrutiny (in First Amendment jurisprudence and elsewhere) would be a virtual dead letter. All that a legislature would have to do to avoid this requirement would be to include in the statute the authority of an executive official to waive the statutory prohibition for "good cause." Then, so long as the executive official promised to apply the statute in ways that were less intrusive than the statute itself (even if the executive official would not specify the terms and conditions under which he would grant a waiver), the statute would be able to survive heightened scrutiny. That cannot be acceptable. The relevant constitutional question must be whether *the legislature* could have drawn the statutory ban more narrowly, without compromising the government's important interests, not whether an executive official has the authority to narrow the application of an overbroad prohibition that is not necessary to

serve the government's asserted interests.

For all of these reasons, the waiver scheme embodied in the *Third Report and Order* does not alleviate the constitutional infirmities of Section 533(b).

III. THE *THIRD REPORT AND ORDER* CONFIRMS THAT SECTION 533(b)'S BAN ON TELEPHONE COMPANY SPEECH IS NOT NECESSARY TO PREVENT THE EVILS THE GOVERNMENT RELIES ON TO JUSTIFY THE STATUTE.

The real significance of the *Third Report and Order* to this litigation lies not in its uselessness as a "saving construction," but rather in how the findings and determinations of the FCC contained therein undermine the Government's justifications for Section 533(b)'s flat ban on telephone company speech.

To support its conclusion that it can waive Section 533(b)'s ban on telephone company speech (subject to unspecified conditions), the FCC makes at least *five* crucial concessions in the *Third Report and Order*. Those concessions confirm that Section 533(b)'s ban on telephone company speech is not necessary to prevent the purported evils used by the Government to justify it.

1. The *first* major concession in the *Third Report and Order* concerns the original purported justification for the ban on video programming by telephone companies. Throughout this litigation, the Government has argued that the ban on telephone company speech now embodied in Section 533(b) was originally justified as necessary in order to allow the cable companies the time and opportunity to build and develop a nationwide cable television system that was independent of the

control of the telephone companies. (*See* Govt. Br. 6.)[3] In the *Third Report and Order*, the FCC expressly concedes that any fear that the telephone companies could extinguish the development of an independent cable industry is "no longer relevant" because since 1970, "the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and 'has replaced over-the-air broadcast television as the primary provider of video programming.'" (Govt. Supp. Br. 11a (quoting *Turner Broadcasting Sys., Inc. v. United States*, 114 S. Ct. 2445, 2454 (1994).)

2. The *second* major concession in the *Third Report and Order* is the FCC's acknowledgment that, in light of "significant advances in technology," it is now "possible for a multitude of programmers to reach end user customers." (Govt. Supp. Br. 11a-12a.) What this means is that, in light of developments in technology, *but for the impact of Section 533(b)*, there could now be at least *two* ways for any video speaker to reach his or her end-user audience -- either over the existing nontelephone company cable delivery system *or* over the telephone company's telephone network. In an artfully worded understatement, the FCC concedes that these advances in technology "have mitigated to a fair degree the competitive concerns that led the Commission and Congress to" ban telephone company video programming. (Govt. Supp. Br. 12a.)

3. The *third* major concession in the *Third Report and Order* relates to the overall effect on competition in the provision of video programming if the telephone companies were allowed to speak over their own separate system. The

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[3] The Government contends that the FCC's original ban on telephone company video programming was "[i]ntend[ed] to insure against arbitrary blockage of the gateway and to preserve a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities." (Govt. Br. 6) (quotations omitted).)

FCC explicitly recognizes that "it *does* promote competition to allow a telephone company to provide video dialtone service in its telephone service area in competition with an existing cable company." (Govt. Supp. Br. 16a-17a (emphasis in original).) According to the FCC, what "generally would *not* promote competition [would be] to allow a telephone company to purchase an incumbent monopolist cable operator in the telephone company's service area." (Govt. Supp. Br. 16a (emphasis added).) But Section 533(b) does not even prohibit a telephone company from buying the incumbent cable operator.[4] Rather, it prohibits a telephone company from providing video programming *over its own telephone network or through a separate stand-alone cable system*. In other words, what Section 533(b) prohibits is precisely what the FCC finds in the *Third Report and Order* would promote competition with the incumbent cable monopolists and would provide video speakers with more than one way to reach their audiences. Thus, the FCC effectively concedes that, as written, Section 533(b)'s flat ban on telephone company video programming actually *hinders* the very goals of competition and diversity of voices that the Government argues it is designed to promote.

The combination of these first three concessions -- (i) that the cable companies are now firmly entrenched across the nation; (ii) that technology, unfettered by Section 533(b), would allow video speakers to reach their audiences both over a traditional cable system and through the telephone company network; and (iii) that it would promote, not hinder, competition to allow a telephone company to provide video programming in competition with the incumbent cable monopolist -- has enormous significance for the First

[4] Section 533(b) does not prohibit a telephone company from buying the incumbent cable company, so long as the telephone company does not provide the video programming on that system. This further shows that Section 533(b) does not remotely serve the competitive goals that the Government has advanced in support of it.

Amendment analysis in this case. Specifically, in light of these concessions, it is clear that the only governmental interest that could possibly suffice to justify banning telephone companies from providing video programming would be if the Government could show that telephone company entry into video programming would *drive the incumbent cable companies out of the market*. Otherwise, it is better to have two competitors in each market, and two ways for video speakers to reach their intended audiences, than to have only one, even if the telephone companies do not compete perfectly.

What does this mean for the interests advanced by the Government in support of Section 533(b)? First, it makes some of the Government's arguments utterly *irrelevant*. For example, the Government places great weight on the speculation that telephone companies could discriminate against unaffiliated video *programmers*, arguing that "LECs could use their control over the network to ensure that the quality of their own video signal is better than that of [unaffiliated video programmers]." (Govt. Br. 36.) But even if that were true -- a dubious proposition[5]-- it is irrelevant. For,

[5] The Government does not attempt to explain how it would be technologically feasible for a telephone company that was delivering a video signal with scores of different channels into an end-user's home to degrade the quality of the signal for some channels (those carrying programs of unaffiliated video programmers) while maintaining the quality of the signal for other channels (those carrying the telephone company's affiliated programming). Technology is not voodoo. If intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), is to have any bite, the Government must carry the burden of establishing that the anticompetitive evils it relies upon to uphold a ban on speech are technologically feasible. The Government has wholly failed to do that in this case. Moreover, in other cases involving voice and data information services, the Government has previously agreed and documented that "there is no substantial risk that a [telephone company] could impede competition through discrimination" against competing providers. Ct. App. JA 2631, 2635. It is absurd for the Government to talk out of one side of its mouth with respect to voice and data services and out of the other side of its mouth to try to uphold Section 533(b)'s ban of video services. In any event, even if a telephone company could degrade the

whatever ability the local telephone company may have to discriminate against unaffiliated programmers, the incumbent cable company has the same ability. If either the telephone company or the incumbent cable company can discriminate against unaffiliated programmers, then it is obviously preferable, from the standpoint of both competition and diversity of voices, that the telephone company be given the incentive to enter the market in competition with the incumbent cable company.[6] Then, if an unaffiliated programmer is discriminated against by either the incumbent cable company or the telephone company, that unaffiliated programmer will (for the first time since the inception of cable television) have somewhere else to turn, and can play the telephone company off against the cable company.

Discrimination against unaffiliated upstream competitors who require access to a downstream firm's facilities is grounds for exclusion of that downstream firm from the upstream market only if (if at all) the downstream firm's facilities are the only way to reach end-line consumers.[7] That principle would

quality of the signal solely for unaffiliated programming, the end-user would surely blame, and hold accountable, the telephone company (which is delivering the signal), not the unaffiliated programmer.

[6] In recommending the repeal of Section 533(b), the National Telecommunications and Information Administration, part of the Department of Commerce, found that telephone companies would likely not have the incentive to invest in the infrastructure necessary to provide video signals over their own network in competition with the cable companies unless the telephone companies could also provide video programming over their networks. *See* J.A. 345

[7] It is this basic principle that makes the NCTA's analogy of Section 533(b) to the breakup of the Bell System fatuous. (*See* NCTA Br. 39.) The reason the Justice Department thought it appropriate to break up the Bell System and then exclude the local Bell telephone companies (such as Bell Atlantic) from providing long-distance service was the fear that a local Bell telephone company could discriminate in favor of its affiliated long-distance provider in access to what was characterized as its "bottleneck" local telephone exchange. The key to the exclusion was that unaffiliated long-distance providers had nowhere else to turn to reach customers in the local

be grounds to exclude the *incumbent cable monopolists* from providing video programming because, as things stand today, unaffiliated programmers must pass through *the incumbent cable companies' bottleneck facilities*. But that situation would no longer exist if telephone companies were allowed to speak over their own separate systems, thus providing unaffiliated programmers with an alternative to delivery through the incumbent cable companies' systems. And in no event is the possibility of such discrimination by the telephone companies grounds for barring them from providing video programming in competition with the incumbent cable monopolists. In short, all of the Government's arguments about the possibility that a telephone company would discriminate against unaffiliated video programmers are irrelevant, and could not possibly justify Section 533(b)'s ban on speech.

telephone company's service area. But, whatever the merits of that position, it has always been considered gospel at the Justice Department and elsewhere that, as soon as there is competition at the local telephone exchange level (*i.e.*, as soon as the unaffiliated long-distance providers could access their customers or complete a long-distance call through a competitor to the incumbent local telephone company), there would no longer be any justification for preventing the local Bell company from providing long-distance service. Here, even if a telephone company discriminated against an unaffiliated programmer, the programmer could switch to the incumbent cable company for delivery of its programming.

It is particularly ironic that the NCTA would raise the analogy to the breakup of the Bell system and the exclusion of local Bell companies from the long-distance market. For today, the incumbent cable monopolists, through bottleneck control of *their* facilities, can prevent a particular video programmer from reaching an end user. If the Bell system analogy were followed here, *the incumbent cable companies would be prohibited from providing video programming* until there was a competing way for unaffiliated programmers to reach their audience. What Section 533(b) does is prevent the telephone companies from breaking the bottleneck held by the incumbent cable companies, thus depriving unaffiliated programmers of an alternative way of reaching their audiences. Thus, to the extent the lessons of the Bell system breakup apply here, they require that Section 533(b) be invalidated so that the incumbent cable companies' bottleneck control of the system of delivery of video speech can be broken.

Second, with respect to the Government's other arguments -- that Section 533(b) is necessary (i) to prevent telephone companies from discriminating *against the incumbent cable companies* in telephone pole and conduit access, and (ii) to prevent telephone companies from gaining unfair competitive advantage *against the incumbent cable companies* by allocating some of the costs of their video programming network to their rate regulated telephone network -- it should be clear that these imagined evils cannot possibly justify Section 533(b)'s ban on speech (even under intermediate level scrutiny) unless the Government demonstrates that they would be *so widespread* and *so pervasive* as to drive the incumbent cable companies out of the market. It is not enough for the Government to speculate that telephone companies may, here or there, engage in *some* discrimination in pole and conduit access, or *some* cross-subsidization. Rather, the Government must also show that such alleged discrimination and cross-subsidization could rise to a level sufficient to drive out the incumbent cable companies. Otherwise, yet again, a second imperfect competitor is better than a monopolist, and two ways for video speakers to reach their audiences are better than one. Here, the Government has not even *attempted* to show that cross-subsidies and discrimination in pole and conduit access could rise to the level of driving out the cable companies. To the contrary, the Government has consistently argued in the context of information services that there is "no substantial possibility" that a telephone company could even *impede* competition through cross-subsidies and discrimination, much less drive competing providers out of the market. Ct. App. JA 1906, 1909.[8] And, indeed, it would not pass the straight-face test to assert that these anticompetitive evils could rise to such a level without the FCC, the Congress, the state utility agencies, and the courts noticing the problem and stepping in to solve it.

[8] Notably, while amicus California Cable Television Association claims to have "unique knowledge of the incentive and ability" of GTE "to engage in anticompetitive behavior" against cable companies, CCTA Brief at 2, it fails to allege even a single instance of such conduct by GTE, much less the requisite pattern of widespread and pervasive conduct.

4. In any event, if there were ever any doubt as to whether the Government's twin makeweights -- discrimination and cross-subsidies -- are sufficiently serious as to justify Section 533(b)'s flat ban on speech, that doubt is removed by the *fourth* major concession made by the FCC in the *Third Report and Order*. In its brief, the Government describes the possibility of discrimination by telephone companies against competitors and improper cross-subsidies as nearly intractable problems, incapable of being effectively policed. (*See* Govt. Br. 34-36.) But the FCC is plainly not overwhelmed by these problems.

Specifically, in concluding that it can and should grant waivers to Section 533(b) for some telephone company video programming, the FCC necessarily concludes in the *Third Report and Order* that it can deal effectively with the problems of cross-subsidies and discrimination through less onerous methods than a flat ban on speech. Indeed, in the *Third Report and Order*, the FCC trumpets that it has *already* "developed a number of safeguards that are designed to prevent cross-subsidization and discrimination" by telephone companies providing video programming. (Govt. Supp. Br. 14a n.35.) According to the FCC, "[t]he safeguards against cross-subsidization include accounting and cost allocation rules that separate nonregulated service costs from the costs associated with providing basic regulated telephone service." (*Id.*) Similarly, the FCC notes that its "non-discrimination safeguards include a variety of rules designed to ensure that unaffiliated enhanced service providers have access to the network on the same basis as affiliated enhanced service providers and are not otherwise unfairly disadvantaged." (*Id.*) Moreover, the FCC explains, in its "ongoing rulemaking proceeding in this [matter]," it will decide whether any *additional* safeguards are needed. *Id.*

Thus, the *Third Report and Order* makes clear that the FCC -- the agency in charge of enforcing Section 533(b) --

believes that it can handle the purported problems of cross-subsidies and discrimination without completely banning the telephone companies from speaking to the subscribers in their service areas. In light of that concession, it seems unimaginable that the Government litigators' vague and speculative invocation of the purportedly intractable problems of discrimination and cross-subsidies could justify Section 533(b)'s flat ban on speech by the telephone companies.

5. The *fifth*, and perhaps most dispositive, concession in the *Third Report and Order* is the fundamental conclusion necessarily embodied in that order: *that there are obviously less intrusive ways of protecting the interests advanced by the Government in support of Section 533(b) than a complete ban on video speech by telephone companies over their own networks in their own service areas.* Although, as we demonstrated above, the *Third Report and Order* does *not* in fact adopt a specific less restrictive alternative to Section 533(b), it is undeniable that the *Third Report and Order* recognizes that such obviously less restrictive alternatives are possible, and, therefore, that *Congress* could adopt one by statute. That concession, under either strict or intermediate scrutiny, is absolutely fatal.

In sum, in its unseemly haste to persuade this Court to avoid passing on the constitutionality of Section 533(b) as enacted by Congress, the FCC has, perhaps unwittingly, undermined all of the arguments made by the Government litigators in defense of Congress' flat ban on speech and confirmed that the statutory ban on telephone company speech is not necessary to serve the interests asserted by the Government. In short, the *Third Report and Order* does not save Section 533(b), it buries it even deeper.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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